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No. 99-5716

In The

Supreme Court of the United States

FLOYD J. CARTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

REPLY BRIEF FOR PETITIONER FLOYD J. CARTER

JEFFREY T. GREEN
JOSEPH S. MILLER
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Of Counsel

RICHARD COUGHLIN
DONALD J. MCCAULEY*
Federal Public Defender
District of New Jersey
972 Broad Street
Newark, New Jersey 07102
(973) 645-6347

Counsel for Petitioner Floyd J. Carter

**Counsel of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Almendarez-Torres v. United States, 523 U.S. 224 (1998) 17

Bates v. United States, 118 S. Ct. 285 (1997) 7

Bell v. United States, 462 U.S. 356 (1983) 2, 14, 15

Evans v. United States, 504 U.S. 255 (1992) 5, 14

Heflin v. United States, 358 U.S. 415 (1959) 9

Jones v. United States, 119 S. Ct. 1215 (1999) 17

Keeble v. United States, 412 U.S. 205 (1973) 18, 19, 20

Morissette v. United States, 342 U.S. 246 (1952) ... *passim*

Neder v. United States, 119 S. Ct. 1827 (1999) 4, 5, 6, 8, 12, 14

Prince v. United States, 352 U.S. 322 (1957) 2, 3, 9, 13

Regina v. Bass, 11 Mod. 55, 88 Eng. Rep. 881 (K.B. 1705) 7

Reno v. Koray, 515 U.S. 50 (1995) 17

Rewis v. United States, 401 U.S. 808 (1971) 17

United Brotherhood of Carpenters & Joiners of America v. United States, 330 U.S. 395 (1947) 19

United States v. DeLeo, 422 F.2d 487 (1st Cir. 1970) 4

United States v. Gaddis, 424 U.S. 544 (1976) 9

United States v. Higgins, 40 M.J. 67 (Ct. Mil. App. 1994) 12

United States v. Johnston, 543 F.2d 55 (8th Cir. 1976) 4

TABLE OF AUTHORITIES – Continued

Page

United States v. Martin Linen Supply Co., 430 U.S. 564 (1977) 19

United States v. Mosley, 126 F.3d 200 (3d Cir. 1997), *cert. dismissed*, 525 U.S. 120 (1998) 18

United States v. Shabani, 513 U.S. 10 (1994) 7

United States v. Wells, 117 S. Ct. 921 (1997) 7, 8

STATUTES

10 U.S.C. § 934 12

18 U.S.C. § 373 (1994) 11, 12

18 U.S.C. § 641 10

18 U.S.C. § 645 (1994) 11

18 U.S.C. § 656 7

18 U.S.C. § 1014 ..... 7, 8

18 U.S.C. § 2113 ..... *passim*

18 U.S.C. § 2314 (1994) 16

18 U.S.C. § 2315 (1994) 16

20 U.S.C. § 1097 ..... 6, 7

21 U.S.C. § 846 7

OTHER

4 William Blackstone, *Commentaries* 2, 16

House Judiciary Committee, *Revision of Title 18, United States Code*, H.R. Rep. No. 80-304, at A135 (1947) 15

2 LaFave & Scott, *Substantive Criminal Law* (1986 & Supp. 1999) 5, 6, 11

ARGUMENT

Respondent's admissions make this a simple case. Respondent admits, as it must, that "under common law, robbery contained *all* of the elements of larceny," including the requirements of asportation and felonious intent. Resp. Br. 30 (emphasis added). Respondent also admits that, prior to the recodification of all federal criminal statutes in 1948, "[t]he common law mental element of larceny – 'feloniously takes' – was incorporated into bank robbery in 1934." Resp. Br. 33. Finally, Respondent admits that, under this Court's decisions in *Morissette v. United States*, 342 U.S. 246 (1952), and similar cases, "bank robbery *must* be presumed to contain a mental element despite Congress's failure to provide expressly for one during the codification of the statute in 1948." Resp. Br. 39 (emphasis added); *id.* at 19 ("There is a presumption that any federal criminal offense requires a mental element. Accordingly, this Court has read a mental element into a criminal statute even where the statute did not expressly provide for one.") (citation omitted). Petitioner and Respondent are thus on common ground as to all three points. See Pet. Br. 20-24, 27-29, 14-20. The parties' dispute is largely reduced to one simple question: In 1948, when Congress recodified the offense of bank robbery, did it eliminate the specific "intent to steal" element that had been part of the offense for the fourteen previous years? The answer, equally simple, is "No."

The text, structure, and history of 18 U.S.C. § 2113, when viewed against the backdrop of common law principles about which there is *no* controversy, indicate that bank larceny has been defined as a lesser included offense of bank robbery, and Respondent offers nothing of substance to the contrary. At the outset, it is clear that a mechanical "plain text" approach is inadequate to construe the statute. Specifically, although Congress did not expressly include any intent element in the recodified

bank robbery provision, the parties agree that *some* mental element *must* be implied. The statute must therefore draw meaning from the common law tradition in which it is so firmly rooted. This Court's decision in *Prince v. United States*, 352 U.S. 322 (1957), which explained the relationship between the robbery and unlawful entry offenses in § 2113, provides additional support for the conclusion that bank robbery, like bank larceny, requires proof of the specific intent to steal. Nor does the decision in *Bell v. United States*, 462 U.S. 356 (1983), as Respondent would have it, cut the definitions of bank robbery and bank larceny free from their common law roots.

Petitioner was entitled to a lesser included offense instruction under a proper interpretation of the bank robbery and bank larceny provisions. He was prejudiced by the district court's denial of the instruction and a remand is therefore required.

1. The text of the statute and its common law antecedents compel the conclusion that bank larceny is a lesser included offense of bank robbery. This result is hardly surprising, inasmuch as larceny and robbery have been two closely linked members of a family of property crimes for centuries. See 4 William Blackstone, *Commentaries* *229-43 (discussing larceny and robbery in chapter entitled "Of Offences Against Private Property").

Respondent offers a series of "plain text" arguments. Resp. Br. 12-17 (regarding intent element), 23-25 (regarding asportation requirement). The core of Respondents' argument on intent is its observation that, "[w]hile bank larceny contains an express 'intent to steal or purloin' element, bank robbery has no such mental element in its text." Resp. Br. 12. Similarly, with respect to the asportation requirement, Respondent observes that the definitions for both bank robbery and bank larceny "use the word 'take[ ]' to describe the *actus reus* of the crime" but that the definition of larceny "*also* requires that the perpetrator 'carries away' the property." Resp. Br. 23-24. In

the remainder of its brief, however, Respondent thoroughly undermines whatever value such "plain text" arguments might otherwise have.

a. On the question of intent, Respondent admits, mere moments after setting forth its plain text arguments, that the meaning of the bank robbery statute is necessarily beyond the reach of a "plain text" approach. According to Respondent, "[a]lthough bank robbery has no specific intent to steal element, that does not mean that it lacks a mental intent element altogether. . . . There is a presumption that any federal criminal offense requires a mental element." Resp. Br. 19. This admission exposes the weakness of Respondent's plain text arguments.

Respondent cannot have it both ways. If, as Respondent correctly admits, this Court's federal criminal jurisprudence makes it proper to imply an intent element of some kind into the bank robbery statute (Resp. Br. 19-20, 39-40), then the plain text of § 2113 alone *cannot*, as Respondent argues elsewhere (Resp. Br. 12-17), provide the answer to the "lesser included offense" question in this case. Indeed, because Petitioner and Respondent agree that *some* intent element *must* be implied in the definition of bank robbery, only one question remains – namely, *which* intent element should be implied, general intent or the specific intent to steal?

Petitioner, by relying on the text, the common law and the statutory history of § 2113, as well as cases such as *Morissette* and *Prince*, has identified – on a principled basis – the specific intent to steal as the *mens rea* that Congress chose for the offense of bank robbery. Congress adopted this specific intent element as part of the definition of bank robbery in the original federal bank robbery statute in 1934 (Pet. Br. 27), and has stated nothing to the contrary since that time (Pet. Br. 30-38). Respondent, by contrast, contends that general intent is the proper choice and offers little in the way of persuasive support. For

example, Respondent cites some "diminished capacity" cases from the courts of appeals. Resp. 20 & n.11. Not one of the cases Respondent cites, however, determined the requisite intent for bank robbery by thoroughly analyzing the common law antecedents and statutory history of § 2113, as the *Morissette* decision requires. See *Morissette*, 342 U.S. at 260-71. Instead, these cases stopped with a superficial contrast among the plain text of the definitions of bank robbery, unlawful entry and bank larceny, which plain text definitions Respondent concedes are inadequate to the interpretive task at hand. See, *e.g.*, *United States v. Johnston*, 543 F.2d 55, 58 (8th Cir. 1976) ("A simple comparison of the language in the two paragraphs of § 2113(a) convinces us that Congress chose to define the second paragraph in terms of specific intent and consciously did not include language of specific intent in the first paragraph."); *United States v. DeLeo*, 422 F.2d 487, 490-91 (1st Cir. 1970) (same). These cases therefore provide little, if any, support for Respondent. Respondent also offers a jumble of policies generally related to robbery as a basis for implying a general intent element in the bank robbery statute. Resp. Br. 21-23. These *post hoc* policy arguments, which Respondent makes no effort to anchor to the statutory text or the common law, should be rejected.

Finally, Respondent also cites a host of other federal and state anti-robbery statutes, some of which purportedly require proof of specific intent, and some of which purportedly do not. Resp. Br. at 14-19. This Court has squarely held, however, that the express presence of a given common law element in other, arguably similar, federal criminal statutes "*cannot* rebut the presumption that Congress intended to incorporate the common-law" element in a disputed statute that appears to lack the element but is generally framed in common law language. *Neder v. United States*, 119 S. Ct. 1827, 1840 n.7 (1999) (emphasis added). "That rebuttal can only come

from the text or structure of the [disputed] statutes themselves." *Id.* Moreover, the statutes that Respondent cites show, at best, nothing more than that both Congress and the various state legislatures have used different verbal formulae to define different robbery-type crimes over the years. These other statutes do not, however, shed much light on precisely how Congress intended to define the crimes of federal bank robbery and bank larceny in § 2113, the issue in this case.

b. On asportation, Respondent relies exclusively on an apparent contrast between the plain text of the bank robbery and bank larceny definitions in § 2113. Resp. Br. 23-24 (bank robbery provision says "takes," whereas bank larceny provisions says "takes and carries away"). This apparent textual difference between the bank robbery and bank larceny provisions, however, actually reproduces a difference in the common law definitions of robbery and larceny. This textual difference thus supports Petitioner, not Respondent.

Specifically, Respondent admits that the "carries away" portion of the bank larceny statute is rooted in the asportation requirement for common law larceny. Resp. Br. 24. Congress thus used common law language – and, by inference, common law meaning – to define bank larceny. See, *e.g.*, *Neder*, 119 S. Ct. at 1839-41; *Evans v. United States*, 504 U.S. 255, 259 (1992); *Morissette*, 342 U.S. at 263. Respondent itself also notes that common law robbery, which plainly shared common law larceny's asportation requirement, "was often defined in simple and undetailed language" that makes *no* mention of asportation, "such as 'the felonious and violent taking of goods or money from the person of another by force or intimidation.' " Resp. Br. 30 quoting 2 LaFave & Scott, *Substantive Criminal Law* § 8.11 n.6 (1986 & Supp. 1999). Indeed, as LaFave and Scott observe, "American statutes do not generally spell out the eight elements [of robbery]; they define the crime of robbery in different ways, often

in the somewhat undetailed language used by Blackstone, Hawkins, Hale and East in defining common-law robbery." 2 LaFave & Scott, *Substantive Criminal Law* § 8.11 n.6 (1986 & Supp. 1999). At the same time, however, such robbery statutes nevertheless include an asportation requirement. See *id.* The elliptical definition of federal bank robbery in § 2113(a) thus conforms to a common feature of American robbery statutes generally. See also Pet. Br. 20-21 & n.16 (quoting robbery and larceny definitions from common law sources). In other words, Congress followed common law usage just as closely by leaving "carries away" implicit for bank robbery as it did by making "carries away" explicit for bank larceny. Common law meaning therefore follows.

Just as it did in the case of the specific intent requirement, Respondent also points to a diverse practice among the States, some of which have retained an asportation requirement in their definitions of robbery and some of which have not. Resp. Br. 25 & n.15. Again, however, the presumption that a federal crime framed in common law terms tacitly includes common law elements cannot be rebutted by different language in *other* statutes. See *Neder*, 119 S. Ct. 1840 n.7. And, in any event, the disparate practices of the states – some requiring proof of asportation, others not – does little to advance the analysis of § 2113, the specific federal statute at issue in this case.

c. The various statutory construction cases Respondent cites to support its plain text arguments do not advance its position. For example, in *Bates v. United States*, which Respondent relies on at pages 6, 10, and 24 of its brief, this Court held that the "specific intent to injure or defraud someone, whether the United States or another, is not an element of the misapplication of [student loan] funds proscribed by" 20 U.S.C. § 1097(a). 118 S. Ct. 285, 288 (1997). In so holding, this Court contrasted 20 U.S.C. § 1097(a) against both § 1097(d)'s express

"intent to defraud" element and 18 U.S.C. § 656's prohibition on the willful misapplication of bank funds, stating that "§ 1097(a) *never* contained, as § 656 did, an 'intent to defraud' requirement, a requirement present from the start and still contained in § 1097(d)." *Id.* at 290 (emphasis added). However, as Respondent admits (Resp. Br. 33), the bank robbery statute – in sharp contrast to the statute at issue in *Bates* – *did* expressly contain a specific intent element, at least until 1948. *Bates* is simply inapposite.

Similarly, in *United States v. Shabani*, which Respondent relies on at page 16 of its brief, this Court held that the drug conspiracy provision at 21 U.S.C. § 846 does not require the government to prove an overt act in furtherance of the conspiracy. 513 U.S. 10, 11 (1994). In so holding, the Court followed the common law understanding of conspiracy rather than implying an overt act requirement into § 846, the text of which is silent on the point.[1] *Id.* at 13-14 ("[A]bsent contrary indications, Congress intends to adopt the common law definition of statutory terms. We have consistently held that the common law understanding of conspiracy does *not* make the doing of any act other than the act of conspiring a condition of liability.") (internal quotations and citations omitted; emphasis added); see also *id.* at 16 ("the criminal agreement itself is the *actus reus* and has been so viewed since *Regina v. Bass*, 11 Mod. 55, 88 Eng. Rep. 881, 882 (K.B. 1705) ('[T]he very assembling together was an overt act') . . . "). In *United States v. Wells*, which Respondent relies on at page 36 of its brief, the Court declined to imply a materiality element into the false statement prohibition of 18 U.S.C. § 1014 because, among other things,

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[1] Respondent inexplicably asserts, with reference to an overt act in furtherance of a conspiracy, that "such proof was required for common law conspiracy." Resp. Br. 17. This is simply incorrect. *See United States v. Shabani*, 513 U.S. 10, 13-14, 16 (1994).

the defendants did not "come close to showing that at common law the term 'false statement' acquired any implication of materiality that came with it into § 1014." 117 S. Ct. 921, 927 (1997); *compare Neder*, 119 S. Ct. 1839-41 (relying on common law to imply materiality requirement into federal mail, wire, and bank fraud statutes). In the case at bar, by contrast, the common law definitions of the offenses at issue – robbery and larceny – unequivocally support the conclusion that specific intent and asportation elements should be implied in the definition of federal bank robbery in § 2113(a). If anything, *Shabani* and *Wells* support Petitioner, not Respondent.

2. The structure of § 2113 as a whole indicates that bank larceny is a lesser included offense of bank robbery. Specifically, the "receiving stolen property"-type crime defined in subsection (c) of § 2113 refers only to property "taken or stolen . . . in violation of subsection (b)" – the bank larceny offense. 18 U.S.C. § 2113(c). It would be strange, indeed, to conclude that bank larceny is other than a lesser included offense of bank robbery, for – on that construction – one who receives stolen property from a bank robber has not committed the offense, but one who receives the same property from a bank larcenist *has* committed the offense. Pet. Br. 11-13. The anomaly disappears if bank larceny is, as Petitioner contends, a lesser included offense of bank robbery: anyone who commits the offense of bank robbery necessarily commits the lesser offense of bank larceny, and thus one who knowingly receives stolen property from a bank robber is no less guilty under subsection (c) than one who knowingly receives stolen property from a bank larcenist.

Respondent promises an answer on this point and then fails to deliver. Specifically, Respondent baldly asserts "that in most cases receipt of the proceeds of bank robbery will be covered by Section 2113(c)" (Resp. Br. 14 n.6), referring the reader to footnote 25 later in its brief. One will search footnote 25 in vain, however, for any

support for Respondent's contention that "in most cases receipt of the proceeds of bank robbery will be covered by Section 2113(c)." All that footnote 25 of Respondent's brief contains is a discussion urging a narrow view of the Court's decision in *United States v. Gaddis*, 424 U.S. 544 (1976), and a passing reference to *Heflin v. United States*, 358 U.S. 415 (1959).[2] Nowhere, however, does Respondent explain why subsection (c) of § 2113 proscribes knowing receipt of bank robbery proceeds "in most cases." Petitioner has offered the *only* explanation of how the statute proscribes knowing receipt of bank robbery proceeds in *all* cases – namely, by defining bank larceny as a lesser included offense of bank robbery.

3. Petitioner and Respondent agree on the basic events comprising the statutory history of § 2113. *Compare* Pet. Br. 27-33 *with* Resp. Br. 30-33. The parties disagree, however, about the proper conclusions to be drawn from that history. According to Respondent, "Congress's

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[2] In *Heflin v. United States*, 358 U.S. 415, 419-20 (1959), this Court held that one could not be convicted of both the aggravated taking offense in 18 U.S.C. § 2113(d) and the unlawful receipt offense in 18 U.S.C. § 2113(c) for the same underlying conduct. The Court reasoned that "subsection (c) was not designed to increase the punishment for him who robs a bank but only to provide punishment for those who receive the loot from the robber," and that there was "no purpose of Congress to pyramid penalties for lesser offenses following the robbery." *Id.* at 419. In *United States v. Gaddis*, 424 U.S. 544, 547-51 (1976), this Court held that a new trial was not the exclusive remedy when multiple counts under 18 U.S.C. §§ 2113(a), (b), (c), and (d) were wrongly submitted to a jury in violation of the rules of *Prince v. United States*, 352 U.S. 322 (1957), and *Heflin*, 358 U.S. at 419-20. In doing so, this Court reaffirmed that "a person convicted of robbing a bank in violation of 18 U.S.C. §§ 2113(a), (b), and (d), cannot also be convicted of receiving or possessing the proceeds of that robbery in violation of 18 U.S.C. § 2113(c)." *Gaddis*, 424 U.S. at 547.

specific elimination of 'feloniously' from the bank robbery section of the statute, while retaining the 'intent to steal or purloin' element in the bank larceny section of the statute, showed an 'affirmative instruction' to delete an intent to steal from the bank robbery statute." Resp. Br. 41 (citing *Morissette*). The *Morissette* decision, however, forecloses this faulty analysis because there has been no such affirmative instruction to eliminate the specific intent element from the definition of federal bank robbery.

As was noted above, Respondent admits "that, under *Morissette, supra,* bank robbery must be presumed to contain a mental element despite Congress's failure to provide expressly for one during the codification of the statute in 1948". Resp. Br. at 39. Having done so, Respondent cannot by simple fiat ignore the thorough analysis of and reliance upon the common law antecedents of the federal crime in dispute that *Morissette* mandates. Pet. Br. 17-19, 34-35.

In *Morissette*, this Court carefully reviewed the several statutes that were drawn together and recodified at 18 U.S.C. § 641, together with their common law antecedents. Despite Congress's having trimmed the language of specific intent from the recodified statute, the Court concluded that "[t]he history of § 641 demonstrates that it was to apply to acts which constituted larceny or embezzlement at common law and also acts which shade into those crimes but which, most strictly considered, might not be found to fit their fixed definitions." *Id.* at 269 n.28. Along the way to reaching this conclusion, the Court rejected the government's contention in that case – essentially identical to Respondent's arguments here – that it was sufficient under the statute to require proof of general intent alone, and that Congress intended as much by dropping express references to the specific intent to steal from the predecessor statutes. *Id.* at 264. The Court rejected the argument because the common law, not the

government's current policy preference, remained the touchstone for interpreting the federal criminal statute. *Id.* at 263, 270-71. Congress's omission of the modifier "feloniously" from the recodified definition of bank robbery was no more an affirmative instruction to disregard the common law meaning of the remaining words in the statute than it was in *Morissette*.

Importantly, there is a simple and proven way for Congress to make its intent to break with the traditions of the common law in a given instance abundantly clear. For example, in 18 U.S.C. § 645 (1994), an anti-embezzlement statute aimed at court officers, Congress expressly provided that "[i]t shall not be a defense that the accused person had any interest in [the] moneys or fund" at issue. At common law, such a good faith claim of right to the allegedly embezzled funds was a valid defense. 2 LaFave & Scott, *Substantive Criminal Law* § 8.6(f)(1) (1986 & Supp. 1999) ("One who converts the property of another which is in his lawful possession is not guilty of embezzlement (for his conversion is not fraudulent) if, when he converts, he honestly believes the property is his own or is nobody's, or he otherwise honestly believes he is authorized to convert it.") (footnotes omitted). Congress first passed this particular anti-embezzlement statute, including its express negation of the "good faith claim of right" defense, in 1920 (Act of May 29, 1920, ch. 212, 41 Stat. 630), *i.e.*, 28 years *before* it recodified the bank robbery and bank larceny statutes and dropped the modifier "feloniously" from the definition of bank robbery.

Congress employed the same technique more recently in 18 U.S.C. § 373 (1994), which was first enacted in 1984 (Pub. L. 98-473, Title II, § 1003(a), 98 Stat. 1837, 2138) and criminalizes the solicitation of a crime of violence. Subsection (c) of this anti-solicitation statute expressly provides that "[i]t is not a defense to a prosecution under this section that the person solicited could not be convicted of the crime because," *inter alia*, "he lacked

the state of mind required for its commission" or "because he was incompetent or irresponsible." 18 U.S.C. § 373(c) (1994). Without this provision, the solicitee's lack of knowledge or intent could well be a defense for the solicitor. See, *e.g.*, *United States v. Higgins*, 40 M.J. 67, 68-70 (Ct. Mil. App. 1994) (reversing acceptance of guilty plea to solicitation of larceny under 10 U.S.C. § 934, and expressly distinguishing the contrary result that would be required under 18 U.S.C. § 373(c)).

If, as Respondent argues, Congress had intended to eliminate the specific intent element from the definition of bank robbery when it recodified the provision in 1948, it would have done more than merely drop the modifier "feloniously" from that definition. Instead, Congress would have expressly provided within the bank robbery provision – in much the same way it had done 28 years *earlier* in the anti-embezzlement statute aimed at court officers – that "it shall not be a defense that the accused person lacked the specific intent to steal." That Congress did not employ this already-familiar method reinforces the conclusion that Congress intended to hew to, not to break from, the common law.

Alternatively, Congress can break with the common law meaning of a federal crime by defining the crime in such a way that it precludes, at a structural level, the importation of one or more common law elements. This approach is illustrated by the fraud statutes construed in the *Neder* case. There, on the strength of the presumption in favor of common law meaning for common law terms, this Court held that "materiality is an element of a 'scheme or artifice to defraud' under the federal" mail, wire, and bank fraud statutes. 119 S. Ct. at 1839. At the same time, however, the Court explained that the basic structure of a "scheme to defraud" offense inherently precluded incorporation of the common law fraud elements of justifiable reliance and damages: "By prohibiting the 'scheme to defraud,' rather than the completed

fraud, the elements of reliance and damage would clearly be inconsistent with the statutes Congress enacted." *Id.* at 1841. In this case, however, Respondent does not – indeed, cannot – show that the basic structure of the bank larceny and bank robbery provisions logically precludes the interpretation of the statute for which Petitioner argues.

4. This Court's decision in *Prince v. United States*, 353 U.S. 322 (1957), provides direct support for petitioner. Pet. Br. 36-37. Respondent attacks Petitioner's reliance on *Prince* (Resp. Br. 36-39), asserting that "the 'narrow' issue before the Court [in *Prince*] was whether the statute" at issue here, 18 U.S.C. § 2113, "authorized cumulative punishment for the two offenses [of bank robbery and unlawful entry], and that was the only issue the Court resolved." Resp. Br. 37 (internal citation omitted). Respondent recites the result in *Prince* correctly, but ignores this Court's reasoning in *Prince*.

After analyzing the legislative history of § 2113, this Court concluded in *Prince* that an unlawful entry offense merges with a completed bank robbery, thus barring cumulative punishment for bank robbery and unlawful entry convictions. 352 U.S. at 325-29. Central to the Court's conclusion was the fundamental premise that both unlawful entry and bank robbery share the *same* specific intent to steal:

> The gravamen of the [unlawful entry] offense is not in the act of entering, which satisfies the terms of the statute even if it is simply walking through an open, public door during normal business hours. Rather *the heart of the crime is the intent to steal. This mental element merges into the completed crime* if the robbery is consummated.

Id. at 328 (emphasis added) (footnote omitted). As Petitioner has explained, the Court's reasoning in *Prince* makes sense only if bank robbery, like unlawful entry of a bank, has at its heart the specific intent to steal. Pet. Br.

37. Respondent does not, and cannot, refute this basic point.

5. The decision in *Bell v. United States*, 462 U.S. 356 (1983), does not, as Respondent contends, completely sever § 2113 from its common law roots. Resp. Br. 33-34. As Petitioner has explained (Pet. Br. 37 n.22), this Court held in *Bell* that the government can satisfy the "takes and carries away" element of bank larceny with proof that a defendant took the bank's property by false pretenses, a manner of taking property that fell outside the scope of the "takes" element of common law larceny. 462 U.S. at 359-60. It is equally clear, however, that whether by false pretenses or otherwise, a taking and carrying away was still a required element of the crime. As the Court was careful to state, § 2113(b) "does *not* apply to a case of false pretenses in which there is not a taking and carrying away."[3] *Id.* at 361 (emphasis added). In this case,

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[3] As Petitioner has explained (Pet. Br. 37 n.22), and as this Court's decisions in *Evans v. United States*, 504 U.S. 255 (1992), and *Neder v. United States*, 119 S. Ct. 1827 (1999), illustrate, there is nothing incongruous in concluding that Congress has extended one aspect of a federal criminal offense beyond its common law confines, while hewing closely to the common law definition of the crime on another aspect of the very same offense. *See Evans*, 504 U.S. at 263-64 ("Although the present statutory text is much broader than the common-law definition of extortion . . . the portion of the statute that refers to official misconduct continues to mirror the common law definition."); *Neder*, 119 S. Ct. at 1841 ("[T]he Government is correct that the fraud statutes did not incorporate *all* the elements of common-law fraud. The common-law requirements of 'justifiable reliance' and 'damages,' for example, plainly have no place in the federal fraud statutes. By prohibiting the 'scheme to defraud,' rather than the completed fraud, the elements of reliance and damage would clearly be inconsistent with the statutes Congress enacted. But while the language of the fraud statutes is incompatible with these requirements, the Government has failed to show that this language is

in sharp contrast to *Bell*, Respondent seeks *not* to broaden the manner of proving the specific intent element of bank robbery, as it did in expanding the meaning of "takes and carries away" in *Bell*, but rather seeks to eliminate the specific intent element from bank robbery altogether. Neither *Bell* nor any other decision of this Court supports such a result, and the seminal case of *Morissette* requires the conclusion urged by Petitioner.

6. As Petitioner has explained, the federal bank larceny provision sets forth two different degrees of punishment in two separate paragraphs, with the severity of the punishment depending upon the value of the property taken from the bank. Pet. Br. 41. Specifically, where the value exceeds $1,000, punishment can include imprisonment for up to ten years, but where the value does not exceed $1,000, punishment cannot exceed one year. *Compare* 18 U.S.C. § 2113(b), ¶ 1, *with* 18 U.S.C. § 2113(b), ¶ 2; see House Judiciary Committee, *Revision of Title 18, United States Code*, H.R. Rep. No. 80-304, at A135 (1947) ("the provisions of subsection (b) measur[e] the punishment [for larceny] by the amount involved"). The United States Sentencing Commission has, of course, made the amount of loss the preeminent factor in determining the sentence for theft offenses. Pet. Br. 44. However, with respect to the basic requirement that some property be stolen – *i.e.*, that one be shown to have taken "any property or money or any other thing of value" – the bank robbery and bank larceny provisions are identical in every respect.[4] See 18 U.S.C. § 2113(a), (b). In this respect,

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inconsistent with a materiality requirement.") (citations omitted).

[4] The use of a monetary cut-off to distinguish between grades of punishment in the definition of federal bank larceny thus contrasts with those federal crimes where a monetary threshold is used to set a jurisdictional minimum that helps to define the crime, *i.e.*, an amount of money below which the

once again, the federal statute mimics the longstanding common law relationship between robbery and larceny, the latter of which was a lesser included offense of the former *and* had two different grades (with different punishments) depending on the amount of money stolen. Pet. Br. 40-41; 4 William Blackstone, *Commentaries* *229-42.[5]

Respondent urges that the different grades of larceny actually constitute completely different offenses. In urging this conclusion, Respondent relies on the fact that the larceny provision is broken into two separate paragraphs. Resp. Br. 26. But the argument ignores the more salient fact that the larceny provision is set off, as a single definition, in a separate lettered subsection. It is primarily in this fashion that different offenses are set off from one another in § 2113. Pet. Br. 42. Respondent also conflates the question whether a given fact is an element of the crime (or, instead, a sentencing factor) with the distinction between felonies (which must, in the federal system, be charged by indictment) and misdemeanors (which need not be). Resp. Br. 26-27. Nothing in this Court's case law on distinguishing sentencing factors

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conduct is simply not a federal crime at all. *See, e.g.*, 18 U.S.C. § 2314 (1994) (setting $5,000 jurisdictional minimum for federal transporting-stolen-goods crime); 18 U.S.C. § 2315 (1994) (setting $5,000 jurisdictional minimum for federal receiving-stolen-goods crime).

[5] Respondent contends that Petitioner's opening brief miscites Blackstone's *Commentaries* regarding the relationship between petit and grand larceny and the fact that larceny was a lesser included offense of robbery notwithstanding the difference between the two grades of larceny. Resp. Br. 27. The contention is meritless. As Petitioner explained in detail (Pet. Br. 21, 40-41, 43-44) Blackstone clearly states both that petit and grand larceny were "considerably distinguished in their punishment, but not otherwise," and that robbery is an "[o]pen and violent larciny from the *person*." 4 William Blackstone, *Commentaries* *229, *241.

from elements of a crime, however, warrants subordinating that inquiry to the distinction between felonies and misdemeanors. Pet. Br. 42-44 (discussing *Almendarez-Torres v. United States*, 523 U.S. 224 (1998), and *Jones v. United States*, 119 S. Ct. 1215 (1999)).

7. Petitioner has demonstrated that, according to a straightforward application of settled rules of statutory construction for federal criminal statutes, bank larceny is a lesser included offense of bank robbery. Respondent, unprompted by petitioner, is at pains to urge that the rule of lenity does not apply in this case. Resp. Br. 41 n.27. Petitioner agrees, in the sense that the traditional rules of statutory construction, properly applied to the text and history of 18 U.S.C. § 2113, appear adequate to eliminate any doubt regarding the status of bank larceny as a lesser included offense of bank robbery. See *Reno v. Koray*, 515 U.S. 50, 65 (1995) ("The rule of lenity applies only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended.") (internal quotes omitted) (citations omitted). If, however, this Court concludes that it can only guess at the intended effect of the 1948 recodification on the specific "intent to steal" element that respondent admits was part of the pre-1948 bank robbery statute (Resp. Br. 33), then this "ambiguity concerning the ambit of [bank robbery] should be resolved in favor of lenity," *Rewis v. United States*, 401 U.S. 808, 812 (1971), *i.e.*, a specific "intent to steal" element for bank robbery.

8. Finally, according to Respondent, even if this Court concludes that bank larceny is a lesser included offense of bank robbery, the district court's refusal to give the "lesser included offense" instruction that Petitioner requested would not constitute a reversible error. Resp. Br. 43-46. This argument cannot be squared with the record in this case.

To be sure, the district court denied Petitioner's motion for a judgment of acquittal, holding that there

was adequate evidence to support a conviction for robbery if the jury chose to return such a verdict. J.A. 32. According to the district court, "a reasonable jury could indeed find beyond a reasonable doubt, based upon the evidence which has been presented in this case," that Petitioner was guilty of bank robbery. J.A. 32. However, the district court did *not* in any way consider or determine whether, based upon the evidence in this case, a jury could reasonably find him guilty of bank larceny and at the same time acquit him of bank robbery – the evidentiary standard for providing a lesser included offense instruction. See *Keeble v. United States*, 412 U.S. 205, 208 (1973) ("it is now beyond dispute that the defendant is entitled to an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater").

The district court did not make a fact-based assessment about the propriety of a lesser included offense instruction on bank larceny because it viewed the issue as a purely legal matter. Specifically, the district court applied the Third Circuit's holding in *United States v. Mosley*, 126 F.3d 200 (3d Cir. 1997), *cert. dismissed*, 525 U.S. 120 (1998), that *as a matter of law* bank larceny can never be a lesser included offense of bank robbery. J.A. 14 (citing *Mosley*); J.A. 30-31 (same). The Third Circuit's decision in this case also emphasized the purely legal nature of its ruling in *Mosley*. J.A. 84. Under the correct law, however, a fact-based evaluation should have been performed by the district court. The failure to conduct such an evaluation was not harmless, given the evidence that Petitioner did not use force, violence, or intimidation to take the money from the bank. Pet. Br. 2-7.

Respondent attempts to short-circuit this straightforward analysis, arguing that, by denying Petitioner's motion for acquittal, the district court in essence granted a directed verdict against Petitioner. According to

Respondent, "the evidence showed that intimidation occurred," and "the district court properly concluded [that] no reasonable juror could find otherwise." Resp. Br. 45. The record is clear, however, that the district court never considered whether, much less concluded that, "no reasonable juror could find otherwise" than "that intimidation occurred." Resp. Br. 45.

No matter how strong the evidence may be in the prosecutor's favor, the district court cannot direct a guilty verdict against the defendant. See *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 572-73 (1977); *United Brotherhood of Carpenters & Joiners of America v. United States*, 330 U.S. 395, 410 (1947). Moreover, a denial of the defendant's motion for acquittal has never been understood to constitute a finding of guilt. It is therefore not surprising that, in this case, the district court did not apply the directed verdict-type standard that Respondent erroneously invokes. Resp. Br. 45. Again, in denying Petitioner's motion for acquittal, the district court decided the narrow question whether "a reasonable jury could indeed find beyond a reasonable doubt" that all the elements of the crime of bank robbery had been proved. J.A. 32. The district court did not, however, resolve the far different question that Respondent posits, *i.e.*, whether a jury could reasonably *fail* to find that all the elements of bank robbery had been proved beyond a reasonable doubt (a directed verdict-type standard).

Nor is it an answer to Petitioner's request for a properly instructed jury to insist, as Respondent does, that the evidence against Petitioner was strong and that, if the jury had believed Petitioner's account of the relevant facts, it would have acquitted him of the crime on which it did receive instructions. This Court rejected the same argument almost thirty years ago, in *Keeble v. United States*, 412 U.S. 205 (1973). According to *Keeble*,

> if the prosecution has not established beyond a reasonable doubt every element of the offense

> charged, and if no lesser offense instruction is offered, the jury must, as a theoretical matter, return a verdict of acquittal. But a defendant is entitled to a lesser offense instruction – in this context or in any other – precisely because he should not be exposed to the substantial risk that the jury's practice will diverge from theory. Where one of the elements of the offense charged remains in doubt, but the defendant is plainly guilty of *some* offense, the jury is likely to resolve its doubts in favor of conviction.

Id. at 212-13. Time has not diminished the force of this reasoning. Moreover, just as in *Keeble*, "the nature of petitioner's intent" was the central element of the crime that "was very much in dispute at trial" in this case. *Id.* at 213. Respondent's argument that the district court's *per se* denial of the requested "lesser included offense" instruction in this case cannot be reversible error is squarely at odds with both the reasoning and the result in *Keeble*. It should be rejected.

CONCLUSION

For the foregoing reasons, Mr. Carter respectfully requests that the judgment of the United States Court of Appeals for the Third Circuit be reversed and the case be remanded for further proceedings.

Respectfully submitted,

JEFFREY T. GREEN
JOSEPH S. MILLER
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Of Counsel

RICHARD COUGHLIN
DONALD J. MCCAULEY*
Federal Public Defender
District of New Jersey
972 Broad Street
Newark, New Jersey 07102
(973) 645-6347

Counsel for Petitioner
Floyd J. Carter

**Counsel of Record*